Supreme Court, U.S.
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No. 07-10

IN THE

Supreme Court of the United States

LUCILLE MAE MORSE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Defendant's sentence may be enhanced if given a deferment on sentencing on a previous charge?

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OPINION BELOW

Before a three judge panel of the Ninth Circuit an opinion was given that a twenty-five year old deferred sentence in Montana can be used to enhance mandatory minimum punishments relying upon *U.S. v. Norbury*, 492 F.3d 1012 (9th Cir. 2007). The twenty year sentence of the defendant given by the District Court because of the enhancement was upheld. A copy is attached as Appendix A.

JURISDICTION

The Ninth Circuit filed its decision on January 18, 2008. This Court has jurisdiction under 28 U.S.C.

1254(1) to review a circuit court's decision on a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841 (b)(1)(A).

STATEMENT OF FACTS

Morse was charged by indictment filed on September 26, 2005. She was tried by a jury in August of 2006. She was acquitted on counts I and II and convicted on the substantive counts III to X. She was sentenced on November 29, 2006 to 240 months (20 years). Her sentence was enhanced to a mandatory minimum 20 years because of a 25 year old prior deferred charge for which she was never sentenced.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

Whether a deferred sentence is a "final" conviction for purposes of enhancing a sentence under 21 U.S.C. §841 (b)(1)(A) is a question that has been answered differently among the several Circuit Courts. Some Circuits have found a deferred sentence to be a conviction for purposes of federal sentencing. *See United States v. Costa*, No. 07-10092 2008 U.S. App. LEXIS at *1138 (9th Cir. January 17, 2008); *United States v. Campbell*, 980 F.2d 245, 249 (4th Cir. 1992); *United States v. Cisneros*, 112 F.3d 1272, 1280 (5th Cir. 1997) (involving deferred adjudication); *United States v. Mejias*, 47 F.3d 401, 402 (11th Cir. 1995) (involving nolo contendere plea and withheld adjudication); *United States v. Gomez*, 24 F.3d 924 (7th Cir. 1994) at 927-28 (involving expunged and dismissed conviction); *United States v. Meraz*, 998 F.2d 182, 184 (3d

Cir. 1993), (involving conviction's dismissal with prejudice under deferral statute); *United States v. Campbell*, 980 F.2d 245, 249 (4th Cir. 1992), (involving probation sentence under state deferral statute). Other Circuits have held that a previous deferred sentence is not a prior conviction and therefore, enhanced sentencing for a later conviction is not possible. *See United States v. Stober*, 604 F.2d 1274 (10th Cir. 1979); *United States v. Alvarado*, 458 F.Supp.2d 1266 at 1268 (10th Cir. 2006); *United States v. Stallings*, 301 F.3d 919, 920-21 (8th Cir. 2002). Often the decisions by the courts turn on whether or not the court looked to state or federal law in deciding the definition of "conviction". Compare *United States v. Stallings*, 301 F.3d 919, 922 (8th Cir. 2002), *United States v. McAllister*, 29 F.3d 1180, 1185 (7th Cir. 1994); *United States v. Gomez*, 24 F.3d 924, 930 (7th Cir.1994); *United States v. Cisneros*, 112 F.3d 1272, 1280-82 (5th Cir. 1997); *United States v. Campbell*, 980 F.2d 245 (4th Cir. 1992). Other courts seek the legislative intent when discerning the meaning of "conviction" 21 U.S.C. §841 (b)(1)(A). *See United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003); *United States v. Franklin*, 250 F.3d 653, 665 (8th Cir. 2001); *United States v. Mejias*, 47 F.3d 401 (11th Cir. 1995) (per curiam).

II. ARGUMENT

A. Several Circuits Hold a Prior Deferred Conviction is not a "Final" Conviction Under 21 U.S.C. § 841 (b)(1)(A).

The Tenth Circuit court has treated deferred judgment as no judgment at all. *United States v. Stober*, 604 F.2d 1274 (10th Cir. 1979). In *Stober*, the defendant was indicted for a violation of 18 U.S.C. § 922(h)

and § 924(a) for receiving firearms shipped in interstate commerce after he had been convicted of a felony. *Id.* at 1275. The defendant had entered a plea of guilt under the Oklahoma Deferred Judgment Procedure, 22 O.S.Supp.1977 § 991c in the earlier charge. *Id.* The issue considered on appeal was whether the defendant had been previously convicted. *Id.* The Oklahoma Court of Criminal Appeals held that a "conviction" does not arise under the Deferred Judgment Procedure. *Id.* at 1276. Thus, if a person was not "convicted" by the Oklahoma courts, the federal court cannot hold that he was convicted in the Oklahoma courts for the purpose of enhanced punishment under federal law.

The Tenth Circuit court has held that the state determination on whether the proceedings in its court constitute a conviction was to be followed by the federal courts. *United States v. Stober*, 604 F.2d 1274, 1276 (10th Cir. 1979); *United States v. Parker*, 604 F.2d 1327, 1339 (10th Cir. 1979). The First Circuit has observed that it did not believe "Congress intended the meaning of convicted to depend upon the local law's singularities, if any." *United States v. Samson*, 533 F.2d 721, 723 (1st Cir. 1976).

In *State v. Tomaskie*, 2007 MT 103, 337 Mont. 130, 157 P.3d 691 the defendant had received a deferred sentence for a first conviction of criminal possession of dangerous drugs. The court held that it did not constitute a conviction and final judgment, as the terms were defined in Mont. Code Ann. § 46-1-202(7) and (11). "As to the Havre City Court charge, the imposition of a deferred sentence does not constitute a conviction and final judgment. *Davis v. State*, 2004 MT 112, ¶ 16, 321 Mont. 118, ¶ 16, 88 P.3d 1285, ¶ 16." *Tomaskie* at ¶ 13. The Statutory definition of "judg-

ment" states that if a defendant is adjudicated guilty, judgment includes the sentence pronounced by the court. § 46-1-202 M.C.A. (2005). Under the deferred sentencing statutes a person is not sentenced unless the deferred sentence is revoked. Thus, a prerequisite for an appeal from justice court to district court is the imposition of sentence, and so a final judgment. *State v. Todd*, 262 Mont. 108, 111, 863 P.2d 423, (Mont. 1993).

Under North Dakota law, a conviction was considered as not "final" because the sentence was not final. *See Davis v. State*, 625 N.W.2d 855, 858-59 (N.D. 2001) In this case, the court, responding to a defendant's double jeopardy claim after re-sentencing for a probation revocation, held that "a sentence which includes probation is not final." *Davis v. State*, 2001 ND 85, P11 (N.D. 2001).

In *United States v. Miller*, 434 F.3d 820 (6th Cir. 2006), the defendant pled guilty to multiple offenses, including drug and firearms convictions. The defendant argued that the district court erred by enhancing his sentence pursuant to 21 U.S.C.S. § 841 (b)(1) based on a prior conviction that, defendant argued, had not become final. That Court held the question of finality of conviction is to be decided by federal and not state law. The court observed that under federal law, defendant's conviction becomes final when the time for an appeal from the judgment of conviction had expired. The court also pointed out that the Georgia penal code contains a first-offender sentencing provision that permits a two-year probationary period in lieu of incarceration. Successful completion of probation entitles a first-offender to be discharged without court adjudication of guilt and, as a result,

the defendant shall not be considered to have a criminal conviction.

In *United States v. Alvarado*, 458 F. Supp. 2d 1266 (D.N.M. 2006), the defendant had previously pled guilty to fourth degree felony possession of a controlled substance and misdemeanor possession of drugs in the District Court (New Mexico), and the court had granted him a conditional discharge. Later, the defendant was arrested and charged in state court with felony possession with intent to distribute a controlled substance, and he pled guilty to that offense. *Id.* at 1267. The court considered whether prejudgment probation amounted to conviction and held that it was not a final conviction. *Id.* at 1270. The court observed that under Tenth Circuit precedent, the deferred sentence in a criminal case is not a criminal conviction for purposes of federal sentencing. *Id.* at 1268. In cases that consider an earlier deferred sentence, there can be no valid prior felony conviction because there has been no determination of guilt. *Id. see also United States v. Hazelton*, 279 F. Supp. 2d 710, 714 (E.D. Va. 2003).

Federal sentencing may depend on state treatment of crime, where the defendant is sentenced under a state deferral statute, converting a felony to a misdemeanor if the defendant successfully completes probation. The state's classification of the offense, although subject to change, will determine the classification for federal sentencing. If, for example, the state felony conviction has not yet been converted to a misdemeanor under state law because the defendant has been convicted of a federal crime before completing the state's probationary period, federal courts have deemed the state sentence a final prior felony conviction under Section 841 (b) even though

the sentence was to probation. *See U.S. v. Campbell*, 980 F.2d 245 (4th Cir. 1992) (Virginia law); *U.S. v. Short*, 947 F.2d 1445 (10th Cir. 1991), cert. den. 118 L. Ed. 2d 397, (Utah law); *U.S. v. Morales*, 854 F.2d 65 (5th Cir. 1988) (Texas law); *U.S. v Petros*, 747 F. Supp. 368 (E.D. Mich. 1990)(Michigan law).

B. Circuit Courts That Hold a Deferred Sentence is a "Final" Conviction Under 21 U.S.C. §841 (b)(1)(A) Base Their Reasoning on Case Law That Has Been Superceded by Statute.

The Government relies on the reasoning in a series of gun control cases to argue that Morse's prior deferred conviction is a "final" conviction under 21 U.S.C. § 841 (b)(1)(A), thus permitting enhanced sentencing under the statute. These gun control cases base their holdings on reasoning which Congress superceded by statute. See 18 U.S.C. § 921(a)(20).

In the case of *Dickerson v. Banner Institute, Inc.*, this Court held: "for purposes of the federal gun control laws, we equate a plea of guilty and its notation by the state court, followed by a sentence of probation, with being "convicted" within the language of [18 U.S.C.S] §§ 922(g) and (h)." *Dickerson v. Banner Institute, Inc.*, 460 U.S. 103 (1983). This Court stated that Iowa law, which may have nullified the defendant's gun conviction, did not control the case; rather, federal law controlled. *Id.* at 114 n.9. This Court examined the gun control statute to conclude that "expunction of a state conviction was not intended by Congress automatically to remove the federal firearms disability." *Id.* at 115. Based on this interpretation of the intent of Congress, the *Dickerson* line of reasoning took off.

After the *Dickerson* decision, Congress amended the definition of "conviction" under the gun control statutes such that the definition "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(a)(20). However, drug possession cases which hold that a prior deferred conviction is "final" under 21 U.S.C. § 841 (b)(1)(A) still base their reasoning on *Dickerson*, contrary to the intent of Congress. *See United States v. Norbury*, 492 F.3d 1012 (9th Cir. 2007) (stating that the *Dickerson* rationale still applies to drug possession cases but not to gun control cases); *United States v. McAllister*, 29 F.3d 1180, 1184-85 (7th Cir. 1994) (analyzing *Dickerson* to conclude that probation was a conviction under § 841 (b)(1)(B)); *United States v. Campbell*, 980 F.2d 245, 251 (4th Cir. 1992) (finding the reasoning of *Dickerson* "persuasive").

In *United States v. Graham*, 315 F.3d 777 (7th Cir. 2003), the court applied the *Dickerson* reasoning to Section 841 (b)(1)(B), stating "the Supreme Court made clear in *Dickerson v. New Banner Institute, Inc.* that expunction does not alter or remove the existence of a prior conviction." *Id.* at 783 (internal citations omitted). In *Norbury*, the court continued with the *Dickerson* reasoning: "[t]he Supreme Court addresses federal gun control statutes in *Dickerson*, but the Court's rationale for applying federal law to the meaning of "conviction" applies equally to federal drug statutes." *Norbury*, 492 F.3d at 1014.

Even though Congress disapproved of applying the gun-control case of *Dickerson* to gun control statutes, Circuit Courts are still applying the old logic of *Dickerson* to drug possession cases under Section 841 (b)(1)(A). In the instant matter, both the District Court and the Court of Appeals for the Ninth Circuit applied

the Government's reasoning, based on *Dickerson*, without further analysis. The Seventh Circuit Court in *Graham* has expressed its inability to overrule *Dickerson*, despite disapproval from Congress, stating "[w]e cannot simply overturn the United States Supreme Court". *Graham*, 315 F.3d at 783. This Court should review the issue of whether *Dickerson* reasoning should be applied to drug possession cases, when it is no longer applied to gun control cases such as *Dickerson* itself, especially as the Circuit Courts differ in their analyses.

C. Under Montana Law, Morse's Deferred Sentence Can be Dismissed at Any Time, and is thus Not a Final Conviction.

Under the Montana Code, to constitute a 'conviction', a sentence as defined in § 46-1-202(25) must be imposed. Mont. Code Ann. § 46-1-202(7); § 46-1-202(25). Section 46-1-202(25 states: ""Sentence" means the judicial disposition of a criminal proceeding upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty." In order that there be a conviction, a sentence must be imposed. *State v. Tomaskie*, 2007 MT 103, 337 Mont. 130, 157 P.3d 691. Further, Morse's sentence can be dismissed and made confidential criminal information at any time under the Montana Code. The Montana statute on deferred imposition of sentence reads:

> Whenever the court has deferred the imposition of sentence and after termination of the time period during which imposition of sentence has been deferred or upon termination of the time remaining on a deferred sentence under 46-18-208, upon motion of the court, the defendant, or

> the defendant's attorney, the court may allow the defendant to withdraw a plea of guilty or nolo contendere or may strike the verdict of guilty from the record and order that the charge or charges against the defendant be dismissed. A copy of the order of dismissal must be sent to the prosecutor and the department of justice, accompanied by a form prepared by the department of justice and containing identifying information about the defendant. After the charge is dismissed, all records and data relating to the charge are confidential criminal justice information, as defined in 44-5-103, and public access to the information may be obtained only by district court order upon good cause shown. § 46-18-204 M.C.A. (2005).

As per the Code, Morse could have her conviction made confidential criminal information at anytime by invoking the provisions of the statute. Therefore, the conviction cannot be said to be "final." Because the *Dickerson* line of reasoning is outdated and has been overruled by statute, this Court should hold that the reasoning of cases like *Tomaskie* and *Stober* should apply to Morse.

D. Because the Meaning of "Conviction" is Ambiguous Under 21 U.S.C. § 841 (b)(1)(A), the Meaning Must Be Interpreted in Favor of Lenity Toward the Defendant.

There is no definition of "conviction" under 21 U.S.C. § 841. The district court in New Mexico noted the various interpretations of how federal courts assess the impact of state law:

> One panel of the Eighth Circuit has relied on state law to determine the sentencing impact of a prior

> state proceeding and state decisions defining the term "conviction." *United States v. Stallings*, 301 F.3d at 921-22. Others have considered state law but on the facts found it consistent with the federal standard. *United States v. McAllister*, 29 F.3d 1180, 1185 (7th Cir. 1994); *United States v. Gomez*, 24 F.3d 924, 930 (7th Cir. 1994); *United States v. Cisneros*, 112 F.3d 1272, 1280-82 (5th Cir. 1997); *United States v. Campbell*, 980 F.2d 245 (4th Cir. 1992). Still other courts hold since § 841 makes no reference to state law the Court is free to create a federal definition of conviction which is directly contrary to state law. *United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003); *United States v. Franklin*, 250 F.3d 653, 665 (8th Cir. 2001); *United States v. Mejias*, 47 F.3d 401 (11th Cir. 1995) (per curiam).

Alvarado (supra) at p.1269.

To interpret the Montana statute in a fashion contrary to established Montana statutory and case law raises serious due process questions when the statute does not define a "prior conviction" that will, result in lengthy or even life imprisonment.

> "Vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979); *United States v. Gallagher*, 99 F.3d 329, 334 (9th Cir. 1996) (quoting Batchelder). In such a context, ambiguities as to the applicable penalty must be resolved in favor of lenity. *Batchelder*, 442 U.S. at 123.

Alvarado, at 1270.

The rule of lenity is rooted in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should'", *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, Benchmarks 209 (1967)). Another purpose of the rule is to assure that criminal statutes provide fair warning of conduct that is illegal and its consequences. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J); *United States v. Capano*, 786 F.2d 122, 128 (3d Cir. 1986). Defendant Morse had no reason to believe that her prior deferred conviction was a final conviction. Defendant Morse's deferred sentence can be dismissed at any time under the Montana Code. She was in fact never sentenced. The principle of lenity counsels against interpreting the Act to give the prosecution the benefit of unsettled law.

CONCLUSION

This court has an opportunity to correct a decision made before Congress changed the law, but is still being erroneously relied upon by the Circuit Courts of Appeal. *Dickerson v. Banner Institute, Inc.*, 460 U.S. 103 (1983). The circuits are split and the reasoning varies in using prior deferred sentencing or adjudications for enhancement. The issue needs some finality.

Respectfully submitted,

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April 18, 2008

APPENDIX

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JAN 18 2008]

No. 06-30636
D.C. No. CR-05-00109-JDS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LUCILLE MAE MORSE,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, *District Judge*, Presiding

Argued and Submitted January 7, 2008
Seattle, Washington

MEMORANDUM *

Before: KLEINFELD, TASHIMA, and TALLMAN, *Circuit Judges.*

In this appeal, Lucy Morse challenges the sentencing enhancement based on a prior conviction,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

the warrant to search her home, and her underlying jury conviction.

The district court could properly enhance Morse's sentence as it did under 21 U.S.C. § 841(b). Her deferred sentence for fraudulently obtaining dangerous drugs did not affect the "conviction's underlying lawfulness."[1] Moreover, a deferred sentence does not amount "to a determination that the crime never occurred or that [she] was in fact innocent."[2]

Morse's sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment because her sentence enhancement was not "grossly disproportionate" to her crime.[3]

The district court followed the proper procedures outlined in 21 U.S.C. § 851(b) for enhancing Morse's sentence. The district court gave Morse "the opportunity to deny the prior conviction," and "[t]hat is all [this] statute requires."[4] Also, the prior conviction used to enhance Morse's sentence was over twenty-five years old, well past the five-year period for challenging prior convictions under § 851(e).

The warrant to search Morse's home was supported by probable cause. Under the totality of the circumstances, information from two controlled drug buys made by a reliable and accurate confidential informant, and claims from two individuals that Lucy

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[1] *United States v. Norbury*, 492 F.3d 1012, 1015 (9th Cir. 2007).

[2] *Id.*

[3] *See Ewing v. California*, 538 U.S. 11, 23 (2003).

[4] *See United States v. Harris*, 592 F.2d 1058, 1061 (9th Cir. 1979).

sold them drugs, created a sufficient basis for probable cause.[5]

Morse did not make a substantial preliminary showing that the affidavit supporting the warrant to search her car deliberately or recklessly included false statements or omitted material statements to entitle her to a Franks hearing.[6] Morse did not show that police lied about the methamphetamine field test, and she did not show that the K-9 sniff test was affected by the presence of her own dogs.

Morse's conviction for Count VI, which was based on an aiding and abetting theory, was supported by sufficient evidence. Mark Butler's testimony provided enough information for a rational trier of fact to find the essential elements of aiding and abetting possession with intent to distribute methamphetamine beyond a reasonable doubt.[7]

The variance between the date of the indictment and the date the crime occurred is "not of a character which could have misled the defendant at trial, and there is no danger of double jeopardy."[8] Therefore, the variance between indictment and proof is immaterial.[9]

AFFIRMED.

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[5] *See United States v. Chavez-Miranda*, 306 F.3d 973, 978 (9th Cir. 2002).

[6] *See United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004).

[7] *See United States v. Perlaza*, 439 F.3d 1149, 1173 (9th Cir. 2007).

[8] *United States v. Tsinhnahijinnie*, 112 F.3d 988, 991 (9th Cir. 1997) (internal quotations and citations omitted).

[9] *Id.*